No. 83-1437

In the
Supreme Court of the United States
OCTOBER TERM, 1984

JEFFREY MAREK, THOMAS WADYCKI
and LAWRENCE RHODE,
Petitioners,

vs.

ALFRED W. CHESNY,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF OF THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether those attorney's fees of a civil rights plaintiff which are incurred after an offer of judgment (Fed. R. Civ. P. 68) can be recovered from the defendant under the Civil Rights Attorney's Fees Awards Act (Title 42 U.S.C. Section 1988), even when the plaintiff rejects the Rule 68 offer of judgment whether or not he then fails to recover an amount in excess of the defendant's offer.

2. Whether a defendant may avail himself of the operation of Rule 68 to bar the plaintiff's recovery of attorney's fees (under Title 42 U.S.C. Section 1988) for services performed by his attorney after the offer when the offer ambiguously lumps the substantive relief, attorney's fees and costs together in one sum and when the sum of all of those components finally obtained and accrued after trial exceeds the amount of the offer made pursuant to Rule 68.

3. Whether this Court should hear the question of the reasonableness of an attorney's fee award request to be made pursuant to Title 42 U.S.C. Sec. 1988, when the question has not properly been raised below, when the district court has made no rulings on the reasonableness of any pending fee requests and when this Court has heretofore given the district courts explicit guidelines to follow when ruling on such attorney's fee requests.

TABLE OF CONTENTS

TABLE OF CASES

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JURISDICTION

The jurisdiction of the Seventh Circuit Court of Appeals was based upon Title 28 U.S.C. Sec. 1294(1). The jurisdiction of the District Court for the Northern District of Illinois was grounded upon Title 28 U.S.C. Sec. 1331(a) (federal question). This Court has granted a Petition for Writ of Certiorari pursuant to Title 28 U.S.C. Sec. 1254(1).

ADDITIONAL STATEMENT OF THE CASE

The respondent, Alfred W. Chesny, is the administrator of the estate of his son, Steven Chesny, deceased. Steven Chesney was shot and killed by the petitioners, Jeffrey Marek, Thomas Wadycki and Lawrence Rhode who, as police officers employed by the Village of Berkeley, Illinois, responded to a domestic disturbance call. On October 5, 1979, the respondent filed a civil rights action against the petitioners, the Village of Berkeley, the Village president and its police chief.

Before the close and completion of discovery and 12 days prior to a scheduled pre-trial conference, the petitioners served upon respondent's attorney an offer of judgment (J.A. 3,4). The offer, dated November 5, 1981, stated as follows:

> "Pursuant to Federal Rule of Civil Procedure 68, the defendants, Jeffrey Marek, Thomas Wadycki and Lawrence Rhode, hereby offers to allow judgment to be taken against them by the plaintiff for a sum, including costs now accrued and attorney's fees of One Hundred Thousand ($100,000) Dollars (J.A.17).

Ten days expired without respondent having served a written notice of acceptance on the petitioners.

After trial, respondent submitted an amended motion for attorney's fees and costs, including secretarial services in the amount of $171,692.47 for both pre-offer and post-offer services. (J.A. 9) Judge Shadur denied the motion as to the post-offer portion of fees and rejected the request for certain items of costs. Respondent submitted a revised request for pre-offer fees and costs totaling $34,392.35. Pursuant to Judge Shadur's prompting, petitioners and respondent, in lieu of an evidentiary hearing, agreed on a figure of $32,000 to represent respondent's costs and fees accruing prior to the offer of judgment. (J.A. 10).

Respondent demanded payment of post-offer attorney's fees inasmuch as Rule 68 did not apply to attorney's fees and, nonetheless, the judgment finally obtained, which included attorney's fees and costs, as did the offer, at $231,692.47, exceeded the $100,000 offer.

In its Memorandum Opinion of September 3, 1982, the district court denied respondent's request for post offer of judgment attorney's fees. (J.A. 24). Judge Shadur held that the term "costs" as found in Rule 68 includes attorney's fees as provided for in Title 42 U.S.C. Section 1988. (J.A. 25). Judge Shadur, after misreading the offer, held that the judgment finally obtained was less favorable than the offer. He believed that the offer was for a sum of $100,000 plus costs and attorney's fees, thus comparing only the verdict with the offer. (Pet. A.).

Respondent appealed the case to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals reversed the district court. *Chesny* v. *Marek,* 720 F.2d 474 (7th Cir. 1983).

Petitioners filed a Petition for Rehearing with suggestion for Rehearing In Banc. (J.A. 26). In the petition, petitioner's sole argument and concern was that respondent might be awarded an unreasonable attorney's fee on remand. (J.A. 36). Petitioners suggested they had not earlier waived this issue on appeal because they first learned of respondent's contingent fee arrangement with

his attorney during oral argument on appeal. (J.A. 31). In fact, as recanted in Judge Shadur's Memorandum Opinion of September 3, 1982, Mr. Chesney's attorney at trial, James D. Montgomery, stated in sworn affidavit that his fees were contingent upon the outcome of this case and Section 1988 (J.A. 25). Furthermore, petitioners were given an opportunity to request an evidentiary hearing to inquire into issues regarding reasonableness of respondent's attorney's fee request. (J.A. 9). Petitioners opted against such hearing and reached a compromise to pay $32,000 as pre-offer attorney's fees and costs. (J.A. 24).

SUMMARY OF ARGUMENT

The Petitioner served a Rule 68 offer of judgment on the respondent prior to trial in the district court. The district court held that respondent was not entitled to post-offer of judgment attorney's fees since the Rule 68 cost shifting provisions applied to Section 1988 attorney's fees. The Seventh Circuit reversed the district court.

Although Rule 68 operates to shift costs when an offer exceeds a judgment and Title 42 U.S.C. Section 1988 awards attorney's fees to a prevailing party, Rule 68 cannot be said to apply against those attorney's fees as well. Rule 68 was intended to shift only traditional costs in accordance with the "American Rule" of practice. Its drafters expressed no concern for shifting attorney's fees although there were a number of attorney's fees statutes prevalent between 1934 and 1938. Indeed, this Rule was of such obvious impact against traditional costs alone that the Advisory Committee failed to furnish the bar with any explanatory comments.

When Title 42 U.S.C. was enacted in 1936, Congress again displayed no inclination toward the possible operation of Rule 68 against attorney's fees. Indeed, if anything at all, Congress expressed the immensely important purpose in passing the 1976 Act of providing the low income private citizen an avenue of relief and vindication of infringements of their constitutionally protected civil rights.

While Rule 68 serves an important purpose in contributing to the settlement of lawsuits it cannot be said to be so important as to stymie legislation as far reaching as Section 1988. If Rule 68 were held to apply to attorney's fee statutes, an unjustifiable two-tier system of federal cases would result. Furthermore, for the low income private citizens, the courtroom door might become forever closed in civil rights matters. The urgent national policy of protecting the civil rights of private citizens must supercede any proposed extension of Rule 68 as a fee shifting mechanism.

The petitioners served a lump sum offer upon the respondent affording no basis for the respondent to effectively heed the ambiguous offer. For petitioners to avail themselves of Rule 68, they must comport with the Rule and separate the substantive relief portion of the offer from all other components.

Because the offer included costs and attorney's fees components in the lump sum offer figure, the judgment finally obtained necessarily includes those components through trial as well. Accordingly, the respondent's judgment finally obtained exceeded the offer.

Petitioners have argued that this Court should review respondent's attorney's fee contract with his attorney and give the district court guidelines to follow in awarding respondent attorney's fees. Respondent advances this argument here without having raised it in the lower court. Furthermore, this Court has on a number of occasions (some recent) given the district court very sound guidelines within which to exercise their discretion in awarding fees. Finally, there is nothing improper about respondent's agreement with his attorney warranting review.

ARGUMENT

I. ATTORNEY'S FEES UNDER 42 U.S.C. SECTION 1988 ARE NOT COSTS WITHIN THE MEANING OF RULE 68.

The definition of "costs" in Rule 68 of the Federal Rules of Civil Procedure should not be construed to include attorney's fees under 42 U.S.C. Sec. 1988.

A. THE DRAFTERS OF THE FEDERAL RULES OF CIVIL PROCEDURE NEVER INTENDED RULE 68 TO OPERATE AGAINST ATTORNEY'S FEE AWARDS.

Petitioners have advanced the idea that the plain meaning of "costs" within Rule 68 and Title 42 U.S.C. Section 1988 requires a conclusion that Rule 68 was designed to operate against attorney's fees. Circuit Judge Posner stated that this is a result reached through a mechanical linking process. *Chesny* v. *Marek,* 720 F.2d 474 (7th Cir. 1983). Petitioners have urged that "costs" in both Rule 68 and Section 1988 must comport in meaning in order to give true substance to those statutes.

The plain meaning rule raised by petitioners is a rule of experience rather than a rule of law. *Watt* v. *Alaska,* 451 U.S. 259 (1981). As such, it has always been subservient to a truly discernable legislative purpose. *Lawson* v. *Suwanee Fruit & Steamship Co.,* 336 U.S. 198 (1949); *District of Columbia* v. *Orleans,* 406 F.2d 957 (D.C. Cir. 1968). Statutes must be viewed in their proper context, considering the logic of Congress and the broad national policy prompting the legislation. *Argosy Limited* v. *Hen-*

nigan, 404 F.2d 14 (5th Cir. 1968). In construing "costs" as found in Rule 68 and Section 1988, we must avoid linguistic seriation and draw upon the history and policies under the legislation of those statutes.[1]

In 1934 Congress authorized the United States Supreme Court to draft rules of procedure that would promote uniformity and consistency throughout the several states. Rules Enabling Act, ch. 651, Secs. 1,2, 48 Stat. 1064 (1934) (Current version at 28 U.S.C. § 2072 (1982)). The Court appointed an advisory committee to conduct hearings, receive comments and make explanatory notes regarding the proposed rules. See Hopkinson, *The New Federal Rules of Civil Procedure Compared With the Former Federal Equity Rules and the Wisconsin Code,* 23 Marq. L. Rev. 159 (1939). The rules became the subject of any commentaries. See *ABA, Rules of Civil Procedure for the District Courts of the United States,* 337-38 (1938). The Advisory Committee published copious notes regarding the rules. *Notes of the Advisory Committee on the Federal Rules of Civil Procedure,* H. Doc. No. 588, 75th Cong., 3d Sess. (1937). H. R. Rep. No. 2743, 75th Cong., 3d Sess. (1938). Rule 68, however, was

[1] Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, sources of interpreting the meaning of any writing; be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning. *Watt* v. *Alaska, supra* at 266 n.9; *Cabell* v. *Markham,* 148 F.2d 737 739 (2nd Cir.) (L. Hand, J.), aff'd, 326 U.S. 404 (1945).

merely cross referenced to three state statutes whence it was borrowed.[2] Thus, the drafters of Rule 68 could draw on no historical basis for considering the impact of the rule on attorney's fee awards. Congress passed the rules without making comment on Rule 68, and little case law developed on the issue until 37 years later.[3]

[2] 2 Minn. Stat. Section 9323 (Mason, 1927); 4 Mont. Rev. Code Ann. Section 9770 (1935); N.Y.C.P.A. Section 177 (1937).

[3] The first case discussing attorney's fees in the context of Rule 68 was actually *Gamlen Chemical Co.* v. *Dacar Chemical Products Co.,* 5 F.R.D. 215 (W.D. Pa. 1946). In that case the court rejected a claim what the word "costs" found in Rule 68 does not include attorney's fees under 42 U.S.C. Section 1988. Cf. *Cruz* v. *Pacific American Insurance Corp.,* 337 F.2d 746 (9th Cir. 1964).

A litany of cases arose after 1975; some rejecting petitioners arguments; *Pigeaud* v. *McLaren,* 699 F.2d 401 (7th Cir. 1983); *Association of Retarded Citizens of North Dakota* v. *Olson,* 561 F. Supp. 495 (D.N.D.), aff'd and modified, 713 F.2d 1384 (8th Cir. 1982); *Greenwood* v. *Stevenson,* 88 F.R.D. 225 (D.R.I. 1980) (dicta); and others supporting them; *Fulps* v. *City of Springfield,* 715 F.2d 1088 (6th Cir. 1983); *Bitsouni* v. *Sheraton Hartford Corp.,* 33 F.E.P. Cases 898 (D. Conn. 1983); *Waters* v. *Heublein, Inc.,* 485 F.Supp. 110 (N.D. Cal. 1979); *Scheriff* v. *Beck,* 452 F.Supp. 1254 (D. Colo. (1978)) (dicta); *Perkins* v. *New Orleans Athletic Club,* 429 F. Supp. 661, 667 (E.D. La. 1976) (dicta); *Honea* v. *Crescent Ford Trust Sales, Inc.,* 394 F.Supp. 201, 202 (E.D. La. 1975) (dicta).

Surely had Congress, the Courts and the Bar understood and intended Rule 68 to apply against attorney's fee awards, litigation would have occurred immediately after the enactment of the Rules since there were already a number of attorney's fee award statutes in effect. See *Alyeska Pipeline Service Company* v. *Wilderness Society,* 421 U.S. 240, 260 n.33 (1975).

Understandably, problems of interpretation of the rules would be raised and settled only after the rules became operative. See Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure,* 23 A.B.A. J. 976 (1937).

No clear definition of "costs" in Rule 68 has developed since its inception. Although there were notable exceptions, "costs" generally did not include attorney's fees when the rules were drafted. *Delta Air Lines* v. *August,* 450 U.S. 346 (1981) (Rehnquist, J., dissenting); See Payne, *Costs in Common Law Actions,* 21 Va.L.Rev. 397, 405 (1935). The legislative history of Rule 68 shows that "Congress did not intend to deviate from the common meaning of costs as the term was used in 1938". *Delta Air Lines,* 450 U.S. at 378. The drafters of the Federal Rules have made express provisions for attorney's fees in other instances, for a variety of policy purposes.[4] See, e.g., Fed. R. Civ. P. Rules 11,37,30 and 56. It is axiomatic that had the drafters intended Rule 68 to operate on attorney's fees, they would have said so. An expansion of the meaning of "costs" to include attorney's fees where the drafters have not provided for them would affect many of the rules as well as attorney's fee statutes. This Court should not expand the scope of Rule 68 beyond what was clearly intended by the drafters. Any such expansion would derrogate against the scheme of the Federal Rules of Civil Procedure and create attorney's fee shifting absent legislation. See *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975).

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[4] In those cases the drafters have made clear the purposes and the types of conduct and circumstances giving rises to an attorney's fee sanction.

B. CONGRESS INTENDED THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 AS AN ENHANCEMENT OF A PRIVATE PARTY'S REMEDIES FREE FROM ANY AUTOMATIC OR ABSOLUTE LIMITATIONS.

Congress has mandated fee shifting in 42 U.S.C. Section 1988 and a multitude of other statutes. See *Alyeska Pipeline Service Company* v. *Wilderness Society,* 421 U.S. 240 (1975). This mandate arose in response to the *Alyeska* decision, which expressly required Congress, and not the courts, to authorize fee-shifting. Id.; S.Rep. No. 94-1011 (1976) (reprinted in 1976 U.S. Code Cong. & Admin. News 5908.) In enacting this law, the intent of Congress was crystal clear: "A party seeking to enforce the rights protected by the statutes * * *, if successful, should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968)." (footnotes omitted). S.Rep. No. 94-1011 p. 4.

Title 42 U.S.C. Section 1988 states, in part, that "a court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Although Section 1988 provides that fees are to be awarded as part of costs, there is no evidence that Congress intended to expand the scope of Rule 68 by the passage of Section 1988. *Delta Air Lines* v. *August,* 450 U.S. 346 (1981) (Rehnquist, J., dissenting). Section 1988 defined "attorney's fees" as "costs" for the sole purpose of awarding attorney's fees against state defendants. See S. Rep. No. 94-1011 p. 5 n.6 (citing *Fairmont Creamery* v. *Minnesota,* 275 U.S. [70] (1927)). This has the practical effect of comporting Section 1988 with the 11th Amendment to the U.S. Constitution. *Hutto*

v. *Finney,* 437 U.S. 678 (1978), and suggests the importance Congress attached to the purposes of Section 1988. "Fee awards are essential if the Federal statutes • • • are to be fully enforced. • • • Fee awards are an integral part of the remedies necessary to obtain compliance." S.Rep. No. 94-1011 p.5. It is clear from such language that the Congress considers Section 1988 imperative for the enforcement of civil rights. See, e.g., *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1976).

This Court has already rejected the mechanical approach that would link up the word "costs" in Rule 68 to the words "fees as part of costs" in Section 1988. See *Roadway Express, Inc.* v. *Piper,* 447 U.S. 752 (1980); *White* v. *New Hampshire Dept of Employment Security,* 455 U.S. 445 (1982).

In *Roadway,* the Court noted that "costs" under 28 U.S.C. Section 1927 were generally defined by 28 U.S.C. Section 1920, which enumerated the costs that may be taxed against a losing party. This Court refused to adopt Roadway's argument that the language in Section 1988 (fees as a part of costs) should be mechanically linked up with the language in 28 U.S.C. Section 1927 (costs can be taken against . . .). Instead, it traced the general definition of "costs" back to 1796. In *Arcambel* v. *Wiseman,* 3 Dall. 306, 1 L.Ed. 613 (1796), the Court overturned an award of attorney's fees as against the general practice of the United States. Thus, it recognized the "American Rule" that attorney's fees are usually not among the costs that can be awarded to a winning party. Roadway at 760. The Court noted that 28 U.S.C. Section 1927 had as its ancestor an 1853 law which set out costs and fees. 28 U.S.C. Section 1927; Act of Feb. 26, 1853, 10 Stat. 161. The Court refused to adopt a definition of

costs under 42 U.S.C. Section 1988 that went contrary to this long history and held that Section 1988 fees are not part of costs that could be awarded under 28 U.S.C. Section 1927.

"Costs" in the Federal Rules of Civil Procedure, just as in the *Roadway* statute, generally do not include attorney's fees. *Association for Retarded Citizens of North Dakota,* 561 F.Supp. 495 (D.N.D. 1982), aff'd and modified, 713 F.2d 1384 (8th Cir. 1982). Costs and attorney's fees have been schematically kept separate by the drafters of the rules and fees are specifically mentioned whenever the rules govern them. Within this framework, there is no evidence that Congress intended to place Section 1988 attorney's fees into the ambit of costs as found in Rule 68. *Roadway; Delta* (Rehnquist, J., dissenting). Without any specific evidence that Congress intended Section 1988 fees to be costs under Rule 68, this Court should be reluctant to extend the meaning and scope of Rule 68. See *Alyeska Pipeline Service* v. *Wilderness Society,* 421 U.S. 240 (1975).

There are policy problems in construing Section 1988 attorney's fees as costs for Rule 68. Section 1988 was enacted as an important tool for the enforcement of civil rights. S.Rep. No. 94-1011 (1976). Rule 68 was designed to create incentive to settle litigation; Section 1988 was designed to encourage litigation, vindicate rights of constitutional dimension and punish civil rights offenders. S. Rep. No. 94-1011 (1976). Fee awards under Section 1988 are in the discretion of the district courts; Rule 68 is automatic and mandatory. *Id.* Though petitioners claim that there is no conflict in the policies of Rule 68 and Section 1988, we see that those policies do *directly* conflict. If attorney's fees were deemed within

"costs" under Rule 68 the rule would do no more than to punish a successful party who may only have miscalculated the size of the expected recovery. See Note, *The Impact of Proposed Rule* 68 *On Civil Rights Litigation,* Colum. L. Rev. 719 (1984) An excellent example is the case at bar. Had the jury awarded the respondent $8,000 more in damages (9 percent), Rule 68 would not be in issue as a bar to attorney's fees. As this Court stated in *Christianberg Garment Co.* v. *E.E.O.C.,* 434 U.S. 412, 422 (1978). "No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not appear until discovery or trial [or] the law may change or clarify in the midst of litigation".) If Rule 68 were expanded to include Section 1988 attorney's fees, it would remove the discretion from the district courts and impose sanctions on the civil rights plaintiff without considering the different equities in each factual setting. Given the importance that Congress and this Court have attached to civil rights litigation, this Court should not allow the discretion to award attorney's fees to be pre-empted from the district courts by the simplistic mechanical application of Rule 68. Congress has clearly mandated Section 1988 attorney's fees for civil rights litigation. See *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 210 (1975). The policy that underlies Rule 68 is valid, but one that would be devastating if applied mechanically and unthinkingly. The district courts already have the power to assess fee sanctions against vexatious parties *Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 litigant. See, e.g., Fed. R. Civ. P., Rule 11; 28 U.S.C. Section 1927; see also *Christianberg Garment Co.* v. *E.E.O.C.,* 434 U.S. 412 (1978). The district courts do not need the automatic sanctions of Rule 68 to assess or limit attorney's fees when demanded by the circumstances. This Court should hold that Section 1988 attorney's fees are not costs for the purpose of Rule 68.

Construing Rule 68 "costs" to include attorney's fees creates the further problem of placing a simultaneous offer of attorney's fees and substantive relief before the plaintiff. *Prandini* v. *National Tea Co.,* 557 F.2d 1015, 1020-21 (3d Cir. 1977). While the plaintiff may feel the offer is inadequate, his attorney's experience might show the offer to be of borderline sufficiency. In such a case, Rule 68 encourages an attorney to zealously attempt to deviate from the client's wishes in urging him to settle. The attorney would necessarily fear having to perform months of services, including trial, without fee. Placing the attorney at financial odds with his client at the settlement stage undermines public confidence in the legal profession as well as the individual bond between attorney and client.

Civil rights and other attorney's fee statute cases can be effectively settled without attorney's fees being a part of a Rule 68 offer. The right of recovery of attorney's fees in a civil rights case is ordinarily conferred upon a prevailing party under 42 U.S.C. Section 1988. *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968); S. Rep. No. 84-1011 (1976). The accepting Rule 68 offeree is deemed such a prevailing party. *Fulps* v. *City of Springfield,* 715 F.2d 1088 (6th Cir. 1983). Including in the offer language such as "and attorney's fees accrued to date" would be superflous if the only purpose were to settle on attorney's fees. The offeree would be

entitled to that amount of attorney's fees in any event. The focus of the offer should appropriately be substantive relief.

A logical result of including attorney's fee in the operation of Rule 68 is the creation of a two-tier system of cost shifting in the federal courts.[5] *Delta Air Lines* v. *August,* 450 U.S. 346, 379 (1981). In cases not involving attorney's fee statutes traditional cost-shifting would apply. The risks borne by plaintiff faced with a Rule 68 offer would be easily quantifiable. The penalty of having to pay his own traditional costs for failing to accept a more favorable offer is a penalty that fits the crime.

In cases involving attorney's fee statutes, the offeree would risk the loss of an attorney's fees reimbursement as well. Attorney's fees, unlike traditional costs, have been specifically legislated by statute and remain in the discretion of trial courts. These fees, can vary widely in magnitude depending on a number of factors. See *Hensley* v. *Eckerhart,* ..... U.S. ....., 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983). They are intended to reimburse a prevailing party for his attorney's fee bill. S. Rep. No. 94-1011, p. 2 (1976). If Rule 68 were deemed to apply in attorney's fees statute cases, an offeree could not effectively gauge his risk and the penalty from his failure to accept the more favorable offer could bankrupt him, where he has brought a meritorious claim.

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[5] Indeed, given the number of attorney's fees statutes that contain language similar to that of 42 U.S.C. Section 1988, as well as the great number that allude to costs in other ways, a mandatory operation of Rule 68 against statutes with Section 1988 type wording would create a disparate impact on a multitude of attorney's fees statutes for absolutely no good reason.

Congress promulgated Sec. 1988 in recognition of the need for a vehicle by which private citizens of modest or meager circumstances could sue to enforce their civil rights under the constitution. S.Rep. No. 94-1011 (1976). Through Section 1988 Congress commissioned private attorney generals to represent the aggrieved parties. In doing so, it reinforced and legitimated what otherwise might have been hollow proclamations and guaranteed minimum rights to the citizens of the United States. Rule 68, as petitioners would have it apply, runs afoul of the principles and virtues embodied in Section 1988. Not only would the plaintiff's attorney think very hard when he holds the Rule 68 offer in his hand, but when his fees are barred he would think even harder about representing the next aggrieved party to come his way. As recited in S. Rep. No. 94-1011 at p. 3, in reference to a case brought under the Labor-Management Reporting and Disclosure Act (Landrum Griffin):

> "Not to award counsel fees in [these] cases • • • would be tantamount to repealing the Act itself by frustrating its basic purpose. • • • Without counsel fees the grant of Federal jurisdiction is but an empty gesture • • •. *Hall* v. *Cole,* 412 U.S. 1 (1973), quoting 462 F. 2d 277, 780-81 (2d Cir. 1972)."

II. EVEN IF RULE 68 COSTS WERE HELD TO INCLUDE ATTORNEY'S FEES UNDER SECTION 1988, RULE 68 SHOULD NOT OPERATE TO BAR FEES FOR POST-OFFER WORK IN THIS CASE.

Respondent again urges that the Seventh Circuit opinion holding "costs" as found in Rule 68 of the Federal Rules of Civil Procedure not to include attorney's fee awards under 42 U.S.C. Section 1988 be upheld. However, should this Court determine otherwise, Respondent

urges nonetheless that the offer made in this case was too ambiguously written to hold respondent to its penalty operation. Alternatively, respondent submits that by the proper operation of the rule as applied in this case the offer failed to exceed the judgment finally obtained.

A. THE RULE 68 OFFER MADE IN THIS CASE IS INVALID.

By making an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure, a defendant places an added settlement inducement and burden upon a presumably informed plaintiff. Typically, that inducement takes the form of a threat or penalty through the barring of costs yet to be incurred which otherwise would have been recovered from the defendant after the entry of judgment. That penalty is imposed upon an informed but unwise or miscalculating plaintiff when the damage offer is found later to have exceeded the judgment finally obtained. It is the imposition of this penalty that distinguishes the Rule 68 offer from all other offers. Respondent maintains that for the petitioners to benefit from Rule 68's harsh penalty provisions, it must present to a plaintiff a clear and discrete substantive damage offer so that the plaintiff may heed this special offer and its potential hardships at the time the offer is served. The plaintiff must determine if 1) the offer is sufficient to compensate him for his injury; and 2) if not, whether he must advisedly accept the deficient amount for fear of the consequences of the Rule 68 penalty structure. In this case, respondent received a Rule 68 offer of $100,000 which included three distinct elements: substantive damages, attorney's fees and costs. While, as noted by

Circuit Judge Posner, the respondent was able to determine his potential "net" recovery, *Chesny* v. *Marek,* 720 F.2d 474, 478 (1983), he was unable to determine the possible consequences of refusing to accept this offer with any degree of accuracy or confidence. Even assuming that within the ten day offer period his attorney was able to calculate his hours and costs spent to date on the case, there would be no certainty as to what hours or rates a district court would later deem reasonable, if any. *Delta Air Lines* v. *August,* 450 U.S. 346, 375 (1981) (Powell, J., concurring in the result). Against the backdrop of a case involving an attorney's fee statute, where the fees are lumped together with the substantive relief, it becomes a practical impossibility for both the defendant and plaintiff to know what substantial relief has been offered. The potential for an enhancement factor creates even greater confusion. Whether Rule 68, in view of this offer, will operate as a penalty against attorney's fees is almost as uncertain as a dice throw, regardless of the projected recovery at trial. Compromise is further hampered by the ten (10) day limit for acceptance of the specious offer. Fed. R. Civ. P., Rule 68. With so much confusion created on both sides of bargaining table, the purpose of Rule 68 could not be furthered. Even if respondent were clairvoyant and determined that his judgment finally obtained would be $60,000, could he have known that the offer exceeded this amount? In the typical case where the offer is properly bifurcated, the answer would be yes. However, in failing to strike a bargain on the offer presented to him in this case, respondent had no opportunity to consider the impact of Rule 68.

In rejecting respondent's challenge to the offer, the Seventh Circuit stated that the open-ended nature of

attorney's fees would in many cases prevent compromise of the case. *Chesny* v. *Marek,* 720 F.2d 474, 477 (7th Cir. 1983). While this *may* be true, the instant case demonstrates that compromise of fees may still be had even after the substantive relief is determined. And even though compromise cannot be reached in some cases, uncertainty should not be an offeree's cross to bear when attorney's fees are at stake.[6] The plaintiff's uncertainty is created only when fees are lumped with the substantive relief.[7] It is the plantiff who can be severely harmed by the offer and it is the plaintiff's attorney who must advise him of the potential harm.

That the fees may be high in one case versus another is within the policy and control of the relevant attorney's fee statute. Once a defendant offers to take judgment against himself he knowingly submits himself to those fee statutes. Open-ended or not, the prospect of having to pay substantially more in attorney's fees once found guilty at trial is a significant settlement inducement for the putative wrong-doer. The policies of both Rule 68 and Section 1988 can thus be furthered when attorney's fees are properly separated from the substantive award. See *Fulps* v. *City of Springfield,* 715 F.2d 1088 (6th Cir. 1983)

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[6] Construing an ancestor provision to Rule 68 a New York Court stated:

> The party making the offer [of judgment] frames it to suit himself. If it does not comply with the statute in all substantial respects, it is a nullity, and it may be treated as such by the party served with it. • • • The offer should be specific and certain in all material respects. *Leslie* v. *Walrath,* 9 N.Y.S.R. 652, 653 (1887)

[7] A defendant's challenge of an attorney's fee agreement is (as in this case) another factor that may impact on the final award and contribute to the uncertainty of a lump sum offer.

(dicta). On the other hand, the policies of Rule 68 cannot be furthered when neither the offeror nor the offeree can sit at the bargaining table and gauge the special impact of this offer.

This Court can easily lay to rest the confusion surrounding this specious lump sum offer by unequivocally holding that the substantive relief portion of a Rule 68 offer must be stated separately from costs and attorney's fees and that therefore the offer in this case in invalid.

B. THE RELEVANT JUDGMENT FINALLY OBTAINED EXCEEDED THE OFFER MADE IN THIS CASE.

Rule 68 includes a cost shifting mechanism when the judgment finally obtained does not exceed the offer. Petitioners, throughout this case have shown that their understanding of the relevant comparison figure for their offer was $100,000. *Chesny* v. *Marek,* 720 F.2d 474, 476 (7th Cir. 1983). That figure included costs and attorney's fees as well as substantive relief. However, petitioners excluded attorney's fees and costs from judgment finally obtained when comparing that figure with the offer. Petitioners stated in their version of the facts that $60,000 verdict did not exceed the $100,000 offer. (Pet. Brief at 5). Petitioners have thus compared apples to oranges.

In a case where a lump sum offer includes attorney's fees and costs to date, the judgment finally obtained must necessarily include those items as they accrue through trial. *Quinto* v. *Legal Times of Washington, Inc.,* 511 F. Supp. 579 (D.D.C. 1981); Rubin, *The Award of Attorney's Fees under the Federal Consumer Credit Protection Act,* 99 Banking L. J., 512, 533 n.80 (1982). Cir-

cuit Judge Posner opined that the judgment finally obtained should not include post-offer attorney's fees. He reasoned that the post-offer fees merely offset the costs to the plaintiff of the additional legal work required for trial. *Chesny* v. *Marek,* 720 F.2d 474, 476 (7th Cir. 1983). But, his reasoning fails insofar as it does not recognize that it is the petitioners who drafted the offer and who chose to have attorney's fees included in the judgment comparison figure by including them in their offer. A defendant should be just as free to make an ill-advised offer as he is to make an effective one. Any other result would give rise to judicial rewriting of his offer.

Accordingly, if this Court is inclined to find that the cost provision of Rule 68 includes Section 1988 attorney's fees, respondent submits that this Court should rule that the offer made in this case is invalid and that the offer failed to exceed the judgment finally obtained pursuant to Rule 68 of the Federal Rules of Civil Procedure.

III. THIS COURT IS NOT THE PROPER FORUM TO DETERMINE THE REASONABLENESS OF ATTORNEY'S FEES IN THE PRESENT ACTION.

A. THIS COURT HAS ALREADY HELD THAT THE REASONABLENESS OF AN ATTORNEY'S FEE AWARD IS WITHIN THE SOUND DISCRETION OF THE TRIAL COURT.

The Seventh Circuit Court of Appeals, in holding that Rule 68 will not operate to bar Section 1988 attorney's fees for post-offer work, remanded this case to the district court to determine the reasonable amount of the fees for post-offer work. *Chesny* v. *Marek,* 720 F.2d 474, 480 (7th Cir. 1983). The court issued no instructions

to the district court concerning the reasonableness of the fees because the amount of a fee award is in the discretion of the district court. E.g., *Hensley* v. *Eckerhart,* ..... U.S. ....., 103 S.Ct. 1933, 76 L.Ed. 40 (1983). This Court should not issue additional directions to the district court concerning the reasonableness of attorney's fees for the same reasons. *Id.* In this case, the district court has not entered a judgment concerning the amount of a fee award for post-offer fees. *Chesny* v. *Marek,* 547 F.Supp. 542 (N.D. Ill. 1982). This Court should properly allow the district court to determine the fee award, based on the merits of the case, pursuant to an evidentiary hearing if necessary.

A prevailing plaintiff in civil rights litigation may ordinarily recover attorney's fees unless special circumstances would render such an award unjust. *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968); S.Rep. No. 94-1011, p. 4 (1976). The district courts have been given broad discretion in awarding the fees, because the trial judge is in the best position to assess the many factors that must be considered to determine the size (or reasonableness) of a fee award. *Id.; Johnson* v. *Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974). Recently, in *Hensley,* this court has given the district courts an outline to consult when determining the size of attorney's fees in civil right actions. *Hensley* v. *Eckerhart,* ..... U.S. ....., 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983). This outline will aid the district court in determining the issue of attorney's fees in the present case in a fashion that is equitable to both parties. Any additional, broadly constructed directions based solely on the merits of this case would remove the discretion from the district court and do injustice to the parties.

B. PETITIONERS HAVE NONETHELESS WAIVED THE ISSUE BY FAILING TO PROPERLY RAISE IT IN THE SEVENTH CIRCUIT.

The respondent, as prevailing party, is entitled to fees based on the reasonable value of his attorney's services in *Hensley* v. *Eckerhart,* ..... U.S. ....., 103 S.Ct. 1933, 765 L.Ed. 2d 40 (1983). The issue of a reasonable fee in the present case was never litigated in the district court. Although Judge Shadur stated that the petitioners were entitled to a hearing on the issue, the parties opted to compromise on a figure for pre-offer fees and costs. The petitioners later failed to raise the issue of a reasonable fee on appeal (J.A. 26). The petitioners claimed that he had no knowledge of the respondent's fee arrangement with his attorney until oral argument in the Seventh Circuit. (Pet. Brief at 37) This claim is directly contradicted by the district court's memorandum opinion of September 3, 1982 which clearly stated the court's recognition that the attorney's fee was contingent on the outcome of the litigation as well as a grant of section 1988 fees. (J.A. 25) Since the issue was not litigated in the district court, and not raised on appeal, the issue is not properly before this court. See *Blum* v. *Stenson,* ..... U.S. ....., 104 S.Ct. 1541, 1545 n.5, 79 L.Ed. 2d 891, 897, n.5 (1984). Finally, there is no proper fee request pending in the district court. (J.A. at 24). Considering the district court's discretion in setting reasonable attorney's fees in light of *Hensley,* the petitioner's failure to litigate or appeal the issue, and the absence of a proper fee request currently pending in the district court, this Court should not hear the issue of reasonableness of fees regardless of the respondent's contract with his attorney.

C. RESPONDENT'S AGREEMENT WITH HIS ATTORNEY DOES NOT CREATE A WINDFALL AS A MATTER OF LAW OR FACT.

The existence of a contingent fee contract does not alter the fact that the fee award is in the discretion of the district court. It is just another factor that must be taken into account in determining the size of the fee award. See *Johnson* v. *Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974). The contingent fee contract will not (and should not) operate to bar statutory fee awards under 42 U.S.C. Section 1988. *Cooper* v. *Singer,* 719 F.2d 1496 (10th Cir. 1983); *Sanchez* v. *Schwartz,* 688 F.2d 503 (7th Cir. 1982); see also, Note, *Attorney's Fees in Damage Actions under the Civil Rights Attorney's Fees Award Act of 1976,* 47 U.Chi.L.Rev. 332 (1980).

The agreement in the present case is notably different from the ordinary "run of the mill" contingent fee agreement. The usual contingent fee agreement would allocate a percentage of the substantive damage award plus all of the Section 1988 fees recovered to the attorney. Alternatives have included a reimbursement of the damage portion of the award when Section 1988 fees are available. The choice is to be made by the parties. The agreement in the present action divides *all* recovery, *both* the substantive damage award *and* the Section 1988 fee award, between the respondent and his attorney. The respondent receives 55 percent of everything recovered while the attorney receives 45 percent. (J.A. 51). Had the respondent lost the action, his attorney would have received no compensation for his effort on behalf of his client. This result can in no sense be characterized as giving the respondent's attorney a windfall profit. Had the contract provided that the attorney would recover

solely Section 1988 fees and the client solely the damage award, respondent's attorney would have been much better off than under the present contract. In this case, the attorney's fees for the entire trial litigation approximated $171,000; damages were $60,000. A standard agreement would give $60,000 (the damages) to the client and $171,000 (attorney's fees) to the attorney. The contract in *this* case would give the client $127,000 (55% of the damage award and 55% of the Section 1988 fee award) and the attorney no more than $104,000 (45% of the recovery). Respondent's attorney is much worse off than were he to have the more popular arrangement with his client An agreement that gives the attorney 33 percent of the substantive damage award *plus* all of section 1988 fees would have given the respondent $39,600 (66% of the damage award) and his attorney $199,000 (33% of the damage award and 100% of the Section 1988 fee award). Although this type of arrangement, as do many others, has the potential to give an attorney a windfall profit, there is no danger of windfall in the present case. Of the three types of agreements discussed above, the agreement in this case gives the respondent's attorney the least and the respondent the most.

Inasmuch as respondent recognizes that an attorney should recover a fee based on the reasonable value of his service as outlined in *Hensley* v. *Eckerhart,* ..... U.S. ....., 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983), the above discussion is offered to illustrate that the existence of a fee agreement is but one factor for the district court to take into account in deciding the amount of a fee award, and not a complete bar to Section 1988 fees. 42 U.S.C. Section 1988 (1982). Accordingly, this Court should allow the district court to determine the reasonableness of respondent's Section 1988 fee request in its discretion and consistent with the guidelines of *Hensley.*

CONCLUSION

The respondent respectfully requests that the judgment of the Court of Appeals For The Seventh Circuit be affirmed and the case remanded to the district court for a determination of a reasonable award of attorney's fees to respondent pursuant to 42 U.S.C. Section 1988 for services performed by his attorney after the offer of judgment.

Respectfully submitted,

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